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No. 87-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLIFTON J. HUMPHRIES,

Petitioner,

—v.—

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CARGILL, INCORPORATED; and COMMERCIAL UNION INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO IN SUPPORT OF THE PETITIONER

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MOTION OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36.3 of the Rules of this Court, the International Longshoremen's Association, AFL-CIO ("ILA") respectfully moves for leave to file the accompanying brief as amicus curiae urging the Court to grant a writ of certiorari to the Fourth Circuit Court of Appeals. In support of this motion, the ILA shows as follows:

1. This motion is necessitated by the refusal of Cargill Incorporated and Commercial Union Insurance Company to consent to the filing of a brief amicus curiae by the ILA.

2. The ILA is an unincorporated association and labor organization within the purview of the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.*, representing employees in an industry affecting commerce as defined in this Act. Its members include close to 100,000 workers in longshore and other cargo-handling trades and crafts from Maine to Texas, on the Great Lakes and in Puerto Rico. *See, e.g., Matter of New York Shipping Association*, 116 N.L.R.B. 1183 (1966).

3. The ILA has a compelling interest in the application of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as amended, 33 U.S.C. § 901 *et seq.*, which is its members' primary source of compensation for job related injuries. The ILA has filed briefs amicus curiae in other cases before this Court involving interpretation of the LHWCA, *P.C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69 (1979); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249 (1977); *Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969). The petitioner in this case, Clifton J. Humphries, is a member of the ILA.

4. This case presents the issue of the lack of uniformity in the standard for determining whether the situs requirement of the LHWCA has been met in a given case. 33 U.S.C. § 903(a). Since the ILA represents longshore and harbor workers in 36 ports from Maine to Texas, it has an interest both in a liberal interpretation of the Act and in the establishment of a uniform policy among the federal circuits for determining where coverage under the LHWCA ends and coverage under an applicable state workers' compensation law begins.

5. The ILA has requested the consent of all parties below to its filing an amicus brief in support of the petition. All except the attorney for Cargill Incorporated and Commercial Union Insurance Company have consented.

Amicus respectfully submits that this case involves an important question of federal law deserving of this Court's attention. The ILA prays that the Court grant its motion to appear as an amicus and to accept the attached brief intended to assist the court in reaching its determination on the petition.

Dated: New York, New York
February 26, 1988

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

INTEREST OF THE AMICUS CURIAE

A statement describing the interest of the International Longshoremen's Association, AFL-CIO ("ILA") in this case is set forth in the foregoing motion for leave to file this brief.

STATEMENT OF THE CASE

Petitioner seeks review of a decision by the Court of Appeals for the Fourth Circuit that denied him benefits under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as amended, 33 U.S.C. § 901 *et seq.* Amicus ILA adopts the statement of facts set forth in the petition, which do not seem to be disputed and may be summarized as follows.

Petitioner had been employed by Respondent Cargill, Inc. ("Cargill") for more than seventeen years until an accident rendering him a paraplegic ended his career. His injury occurred while petitioner was working as a ship foreman for Cargill. Pursuant to the orders of his employer, petitioner drove from Cargill's facility to a restaurant approximately one mile from the marine terminal to pick-up a meal for the ship inspector. Cargill maintained a charge account at the restaurant, and it was part of petitioner's regular duties as ship foreman to go there and bring back a meal whenever a ship inspector worked overtime so that the loading operation would not be interrupted by a meal break. Petitioner suffered his injury outside the restaurant.

The Administrative Law Judge awarded benefits under the LHWCA, Petitioner's Appendix, D-1, holding that petitioner met the situs requirement of the Act in that the restaurant was an "adjoining area" to navigable waters of the United States, which the LHWCA defines to include:

> [A]ny adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.

33 U.S.C. § 903(a).

The Benefits Review Board ("BRB") reversed. Petitioner's Appendix, C-1. In the decision for which review is sought, the Fourth Circuit upheld the Board, holding that petitioner was not injured on a maritime situs. Petitioner's Appendix, B-1.

REASONS FOR GRANTING THE WRIT

1. The Scope of the Situs Requirement of This Important National Law Should be Decided by the Supreme Court.

The LHWCA is an important piece of national legislation covering maritime workers on all the navigable waters of the United States and their adjoining areas. The Act is not merely regulatory but creates a sizable bureaucracy to process and pass upon claims. The public purse as well as the public weal is implicated.

The efforts of labor and management to improve the safety of longshore operations happily have resulted in a reduction in the number of compensation claims brought under the LHWCA in recent years. Notwithstanding, the number of injuries and claims remain substantial: 152,073 in 1984, 107,063 in 1985, and 63,063 in 1986. Employment Standards Administration, Annual Statistical Report: January 1985 at p. 1; February 1986 at p. 1; March 1987 at p. 1. Moreover, despite the fewer claims, the level of compensation and medical benefits has remained consistently high: $369,049,000 in 1983; $351,147,000 in 1984; and $340,430,000 in 1985. Employment Standards Administration, Annual Report on Administration of the Act During Fiscal Year 1986: Table A-1.

The scope of the Act and its resulting cost in benefits is the result of Congressional design. This Court has repeatedly recognized that the Act "must be liberally construed in conformance with its purpose." *Voris v. Eikel*, 346 U.S. 328, 333 (1953) and that "an expansive view of the extended coverage" of the 1972 amendments should be taken. *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 268 (1977).

Historically, the work of longshoremen has been and remains the virtually all-encompassing handling of ocean-going cargo between the inland carrier and the vessel itself. In a less mobile technology, this work once occurred relatively close to the ship. With increasing technological flexibility, the modern ocean ter-

minal has radically expanded in size and complexity, moving ever landward. In addition, necessary and routine functions involved in the loading and unloading of ocean cargo can be carried on at significant distances from the water's edge. There is no longer any need that the marine compound be a single, contiguous geographical unit.

Congress' recognition of the changes wrought by modern technology was one of the primary motivations for the 1972 amendments to the LHWCA. *Caputo*, 432 U.S. at 269. This is reflected in the structure of the expanded coverage provisions, which abandoned the historic "water's edge" approach, *see Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969), in favor of the two-pronged "status" and "situs" test. Under the amendments a claimant must be an employee engaged in maritime employment ("status"), 33 U.S.C. § 902(3), and the injury must occur on the navigable waters of the United States as expansively defined in the Act ("situs"). 33 U.S.C. § 903(a).

The legislative purpose of the 1972 amendments was not merely that coverage be expanded, but also that it should be uniform. *Caputo*, 432 U.S. at 276. One of the drawbacks of the approach adopted by the Fourth Circuit is its propensity to have employees move in and out of coverage in the course of their employment. In this case, no one questions that Humphries met the status requirement. Even though the immediate task he was embarked upon when the accident occurred seems more gastronomic than maritime, the fact is that he was carrying out a regular duty imposed by his longshore employer—a job directly related to the loading of a vessel and calculated to save the employer considerable costs in overtime pay. The sole basis for Humphries' disqualification by both the BRB and the Court of Appeals was that his injury was held to have occurred away from the marine terminal. Had Humphries received the identical injury at the commencement of his trip, *before* he exited the Cargill facility and turned into Bainbridge Boulevard, or at the conclusion of his trip, *after* he pulled off the public highway onto the Cargill facility, he would have been covered. On the same assignment, Humphries was literally driving in and

out of LHWCA coverage. This is directly contrary to the intent of Congress in the 1972 amendments. As noted by the First Circuit, as quoted by this Court, "the evil of the old Act was that it bifurcated coverage for essentially the same employment." *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 275 (1st Cir. 1976), quoted in *Caputo*, 432 U.S. at 276.

When dealing with locations customarily used by employers for longshoring operations, any attempt to define "adjoining area" in the sense of "contiguous" must necessarily defeat the Congressional purpose. Rather, a functional test of the situs requirement must be developed—and it should be devised by this Court.

In the past the Court has repeatedly recognized its obligation to effectuate the legislative intent of the 1972 amendments by defining and explicating their "status" requirement. *See Herb's Welding Inc. v. Gray*, 470 U.S. 414 (1985); *P.C. Pfeiffer Company, Inc. v. Ford*, 433 U.S. 904 (1977), 444 U.S. 69 (1979); *Caputo*, 432 U.S. 249 (1977). The "situs" requirement is no less important to the Congressional design and no less deserving of attention. Both are important factors in a major piece of national legislation, the last word on which should be spoken by the nation's highest Court.

2. This Court Should Grant Certiorari to Resolve a Multi-Circuit Conflict as to the Situs Requirement of the LHWCA.

The circuit courts are in broad disagreement over the situs requirement of the LHWCA. 33 U.S.C. § 903(a). No less than four different approaches have been taken in various jurisdictions.

The Third Circuit holds that an employee engaged in maritime activity may be covered by the LHWCA even if the accident occurs at a remote location separated from the pier by public streets. "The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing." *Sea-Land Service, Inc. v. Director, Office of*

Workers' Compensation Programs, 540 F.2d 629, 638 (3d Cir. 1976). *See also Dravo Corporation v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

The Fifth Circuit holds that the situs under Section 3(a) of the LHWCA may be an adjoining area if it is "close to or in the vicinity of navigable waters, or in a neighboring area." *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514 (5th Cir. 1980). In *Winchester* a gear room located five blocks from the waterfront was held not to be undeniably outside of the waterfront area customarily used by employers for repairing tools used by stevedores. *Id.* at 514. The court also rejected the theory that the presence or absence of non-maritime buildings between the location of the accident and the waterfront should be an absolute test in determining whether an injury is covered by the LHWCA. *Id.*

The Ninth Circuit has enunciated four relevant factors for determining whether a site is an adjoining area in accordance with Section 3(a) of the LHWCA: (1) suitability of the site for maritime uses; (2) whether adjoining properties are devoted primarily for maritime use; (3) proximity of the site to waterway; and (4) whether the site is as close to the waterway as is possible. Applying this test in *Motoviloff v. Director, Office of Workers' Compensation Programs*, 692 F.2d 87 (9th Cir. 1982), the court held that a facility for refurbishing metal containers was not a "situs" in accordance with the LHWCA, since refurbishing did not require a maritime site and the location of the site was dependent on cost and transportation factors rather than its waterfront proximity. However, the same court has held that an accident involving a longshoreman, who while driving his automobile home was injured 1,700 feet landward of the access gate, occurred in an "adjoining area" within the meaning of the LHWCA. *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1101 (9th Cir. 1982).

While the First Circuit has not articulated a test to determine whether a work area meets the "situs" requirement, it has favored a liberal application of the statute. In *Stockman* the First Circuit found Congress intended "adjoining areas" to include

not only those areas directly adjoining an unloading vessel, but also areas that are part of the same waterfront. 539 F.2d at 275.

The Fourth Circuit seems to be at odds with itself. In *Newport News Shipbuilding and Dry Dock Company v. Graham*, 573 F.2d 167 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1979), it held that a submarine shop and foundry were within the navigable waters of the United States, since these locations were integral components of the shipyard even if they were located thousands of feet from the water's edge and did not perform ship-related work exclusively. When the Fourth Circuit in this case affirmed the judgment of the BRB which had denied Humphries compensation pursuant to the LHWCA, it came into conflict with its own past decision.

The ambiguity created as a result of the varying tests for determining if the "situs" requirement of the LHWCA has been met and the courts' differing interpretations call for review by this Court. As matters now stand, longshoremen covered by a uniform master collective bargaining agreement and performing identical services for the same ship as it makes its way along the coast are or are not entitled to compensation under the LHWCA depending solely on the fortuitous circumstance of which port they happen to be injured in. The anomalies wrought by the disagreement among the circuits are particularly odius here, where they vitiate the express Congressional design to avoid inconsistent coverage of the LHWCA and incongruous results. *See Caputo*, 432 U.S. at 268, 273, 276.

A decision by the Supreme Court would resolve the split among the circuits and effectuate the will of Congress with respect to uniform coverage of the Act.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 26, 1988

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